STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11

CONDITIONAL STATEMENT REGARDING AUGUST 20, 2001, REPORT

(Issued December 21, 2001)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of track A (competition issues)[1], various aspects of each item on the 14-point competitive checklist, § 272 (separate subsidiary) issues, and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest § 271 application, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in the multi-state workshop process

[1] See 47 U.S.C. § 271(c)(1)(A).

with the Idaho Public Utilities Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

A report was filed with the Board on August 20, 2001, addressing issues associated with the following checklist items:

- Item 2: Unbundled Network Elements (UNEs)
- Item 4: Access to Unbundled Loops
- Item 5: Access to Unbundled Local Transport
- Item 6: Access to Unbundled Local Switching

Qwest filed written testimony addressing these checklist items on January 19, 2001. On February 23, 2001, the following participants filed testimony or comments: AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc., and TCG Affiliates (collectively AT&T), XO Utah, Inc. (XO), Electric Lightwave, Inc. (ELI), and The Association of Communications Enterprises (ASCENT). The New Mexico Public Regulation Commission Advocacy Staff filed testimony on December 20, 2000. Qwest filed rebuttal testimony on March 9, 2001. Additional testimony was filed by AT&T on March 26, 2001. Rhythms Links (Rhythms) and XO filed additional testimony on March 23, 2001. On April 18, 2001, Qwest filed additional rebuttal testimony. Pre-report briefs were filed on or about May 31, 2001, by the following participants: Qwest, AT&T, ELI/XO, Rhythms, and the Wyoming Consumer Advocate Staff. Qwest and AT&T filed supplemental briefs on June 18, 2001.

The report filed August 20, 2001, separately discussed those issues initially identified by participants but apparently resolved during the process, and those issues that remained subject to disagreement (or where it was not clear that agreement had been reached). For those issues that remained subject to disagreement, the report summarized the participants' positions and provided recommended resolutions.[2] On August 30, 2001, AT&T and Qwest filed comments on the report recommendations.

For those issues where agreement has been reached, the Board is prepared to indicate at this time its conclusion that Qwest has conditionally satisfied the checklist requirements in the areas identified by the August 20, 2001, report. To the extent that some of these issues are to be further evaluated in the Regional Oversight Committee's (ROC) Operations Support Systems (OSS) test or some other proceeding, the Board will incorporate that evidence into its final recommendation to the Federal Communications Commission (FCC) as to whether Qwest has fully complied with a checklist requirement. To the extent that an issue requires performance of some duty or activity on Qwest's part, Qwest will need to demonstrate that it adequately performs as expected in order for the Board to make a positive recommendation to the FCC following an application filed by Qwest.

After reviewing the August 20, 2001, report, the testimony, pre-report briefs, and post-report comments filed by those interested participants, the Board finds that

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[2] This report was prepared by the "outside consultant," The Liberty Consulting Group (Liberty), which has been retained by the state commissions collectively.

no further proceedings are necessary to reach a conditional determination on those issues that remain subject to disagreement in this group of checklist items.

In discussing the Board's conditional recommendations on the remaining impasse issues, the numbering system utilized in the August 20, 2001, report will be followed.

IMPASSE ISSUES

Checklist Item 2: UNEs (Generally)

1. Construction of New UNEs: (Report pp. 21-26; Qwest pre-report UNE brief pp. 10-15; AT&T pre-report UNE brief pp. 4-10; XO/ELI pre-report brief pp. 2-4; Qwest post-report comments pp. 8-9; AT&T post-report comments pp. 1-12)

The overall issue is whether Qwest is obligated to build new UNEs for competitive local exchange carriers (CLECs). The sub-issue is whether Qwest is obligated to provide the electronics to "light" dark fiber.

To support its position, AT&T relies upon the FCC's *Local Competition First Report and Order,* at paragraph 451, shown below:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. <u>In this section, for example, we expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.</u> We also note that section 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under section 251. (emphasis added)

AT&T argues that paragraph 451 provides incumbent local exchange carriers (ILECs) an exemption from building only a single new UNE – unbundled interoffice transport.

AT&T also argues that the final sentence of paragraph 451 provides other UNE exemptions only to rural ILECs. Thus, AT&T concedes that Qwest need not build new unbundled interoffice transport facilities, but it must build all other UNEs because it is not a rural ILEC.

To support its position, Qwest relies upon the FCC's *UNE Remand Order*, at paragraph 324, shown below:

> In the *Local Competition First Report and Order,* the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, <u>we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities the incumbent LEC has not deployed for its own use</u>. (emphasis added)

Qwest argues that paragraph 324 clarifies that the Telecommunications Act created UNEs for the purpose of giving CLECs access to the ILEC's existing network. The Act was not intended to force ILECs to build networks for CLECs. Qwest also believes its position is supported by the Eighth Circuit in *Iowa Utilities Bd. v. FCC,* which states that:

> We also agree with petitioners that subsection 251(c)(3) implicitly requires access to only an incumbent LEC's <u>existing</u> network, -- not to a yet unbuilt superior one. (120 F.3d at 813)

As for lighting dark fiber, AT&T cites paragraph 198 of the *Local Competition First Report and* Order, which states:

> We further conclude that the obligation imposed by sections 251(c)(2) and 251(c)(3) includes modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.

According to AT&T, lighting dark fiber is a "modification" that Qwest is obligated to provide. At some point, Qwest will light the fiber for itself to provide a service to its customers. Also at some point, Qwest will increase the capacity of the electronics for the use of its customers. Because of this, Qwest cannot refuse to light dark fiber or replace electronics for CLECs. To do so is a clear violation of the nondiscrimination provision of section 251(c)(3) of the FCC rules.

Qwest argues that the addition of electronics to dark fiber constitutes the provision of new transport services. Paragraph 324 (shown above) of the *Local Competition First Report and Order* specifically exempts Qwest from any such obligation. Qwest also argues it is in compliance with paragraph 198 (shown above), which requires ILECs to modify their systems for CLECs. Under SGAT section 9.1.2.3 Qwest will perform incremental facility work including: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers.

Liberty notes that neither the Telecommunications Act nor the FCC has explicitly addressed this issue. Thus, Liberty's bases its resolution on an analysis of the following four considerations:

1) Would Qwest recover its costs to build under UNE rates?

Liberty states that UNE rates could significantly under-compensate Qwest for building UNEs or adding electronics to dark fiber. This is because UNE rates are billed monthly without minimum term commitments. A CLEC requiring a new investment should have more than a month-to-month payment obligation. Requiring Qwest to build new UNEs is tantamount to requiring Qwest to absorb the CLEC's investment risk in new facilities. Liberty notes that nothing in the Act or FCC rulings suggests that the promotion of competition requires altering the normal risks of new investments. Liberty concludes that it is wholly inconsistent with the promotion of effective competition to sever the connections between risk and reward by transferring them to a competitor.

2) Does Qwest have any advantage that allows it to build at lower costs than CLECs?

Liberty states that there is no evidence to support any claim that Qwest has a monopoly position with respect to building new facilities. In contrast, any competent carrier should have the capability either to construct new facilities themselves or to contract with third party construction experts. Liberty notes that the FCC's goal of promoting facilities-based competition should also be considered. It is not appropriate to require Qwest to indefinitely serve as both a financing arm and as a construction contractor. If CLECs can transfer these risks to Qwest, there is little reason to expect that facilities-based competition will ever develop.

3) What did the FCC mean by "modification"?

Liberty believes that the meaning of "modification" must be different from the building of new UNEs. Removing bridge taps or load coils constitutes a modification, which makes a facility serviceable as a UNE. Giving "modification" too broad a meaning would support a CLEC's claim that Qwest must replace a smaller switch with a larger switch. If this is what the FCC intended, it would not have spoken in terms of "modification."

4) Is a Qwest refusal to build UNEs discriminatory?

Throughout its brief, AT&T states that, under the Telecommunications Act, Qwest cannot discriminate in favor of itself. Liberty notes that the normal standard of behavior among competitors is one of exploiting any asset to gain advantage over rivals. Discrimination is prohibited only where it is inconsistent with the goals and the specific requirements of the Telecommunications Act. Liberty observes that context is critical in resolving issues where the claim of discrimination has been made. In this situation, Liberty concludes that the general assertions of discrimination are not persuasive.

In its Comments, AT&T strongly criticizes Liberty's analysis and resolution. AT&T states that Liberty's discussion of Qwest's cost-recovery prospects under monthly UNE rates "is a clear attempt to bias the analysis" (p. 5). Regarding Liberty's analysis of the investment risk of new facilities, AT&T states that Liberty's "personal feelings are irrelevant to Qwest's obligations under the Act" (p. 6). AT&T continues to maintain that a modification to the network "can easily encompass the building of new facilities" (p. 12). As for Liberty's analysis of what constitutes discrimination, AT&T states that Liberty is "attempting to rewrite the policies embodied in the Act" (p. 8). Regarding the lighting of dark fiber, AT&T states that Liberty's analysis has "no bearing on the issue" (p. 11).

For the most part, the Board concurs with Liberty's statement that "the precise question here has not been addressed explicitly, either in the Act or in the orders and rules of the FCC" (Report p. 24). The only exception is the single UNE issue of unbundled interoffice transport, which the FCC addressed in the *Local Competition First Report and Order.* For that UNE, both Qwest and AT&T agree that an ILEC need not build new facilities. Both Qwest and AT&T cite other sections of FCC orders that do not directly address an ILEC's obligation to build new UNEs. Qwest also cites *Iowa Utilities Bd. v. FCC*, but the issue there is different. It is the legitimacy of an FCC rule allowing CLECs to request superior quality interconnection facilities. For its part, AT&T does not point to a single approved 271 application from which CLECs can demand that ILECs build new UNEs.

This is an issue tied to Qwest's provider of last resort (POLR) and eligible telecommunications carrier (ETC) obligations. SGAT section 9.1.2.1 outlines these obligations as follows:

> If facilities are not available, Qwest will build facilities dedicated to an end user customer if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic local exchange service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic local exchange service. CLEC will be responsible for any construction charges for

> which an end user customer would be responsible. In other situations, Qwest does not agree that it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to Section 9.19 of this Agreement.

Section 9.1.2.1 extends to CLECs the construction charges, which Qwest's retail customers encounter when facilities are not available. AT&T says that Qwest's refusal to build new UNEs for CLECs puts Qwest in the position of building the "network element for itself to provide the service to the same customer" (Comments p. 4).

What AT&T does not say is how its remedy would advantage AT&T's potential retail customers. It would seem that if a retail customer were located in an area where facilities are unavailable, then the retail customer could avoid applicable construction charges, pursuant to Qwest's retail tariff, by signing up with AT&T. This would give AT&T a competitive advantage over Qwest when recruiting retail customers.

Regarding the lighting of dark fiber, Qwest states that the electronics cost $36,880 per node. A recent central office installation cost $1,237,053 (Br. p. 13). If the SGAT were to require Qwest to provide these electronics as UNEs upon request, CLEC retail customers could again bypass construction charges that would apply if they were retail customers of Qwest.

If SGAT section 9.1.2.1 is left unchanged, the question is whether Qwest would build network elements to provide service to its own retail customers. In the case of lighting dark fiber, it is likely that this situation will occur as Qwest upgrades its existing network. However, once Qwest decides to light the dark fiber, the lit fiber will be available to CLECs as a UNE (see last sentence of SGAT section 9.19).

Therefore, it would seem that leaving SGAT section 9.1.2.1 unchanged would maintain a balance in which neither Qwest nor a CLEC would have a competitive advantage in recruiting retail customers. If Qwest decides not to invest in a network element, then construction charges would apply whether Qwest or the CLEC serves the customer. Alternatively, once Qwest decides to invest in a network element, then UNE rates would apply and the CLEC could compete for the retail customer because it could provide the same services.

The Board will affirm Liberty's resolution for the issues relating to the obligation to build UNEs. Qwest is not required to change its SGAT.

2. Commingling UNEs and Tariffed Services on the Same Facilities: (Report pp. 27-29; Qwest pre-report UNE brief pp. 15-19; AT&T pre-report UNE brief pp. 10-12; Qwest post-report comments p. 9)

The Board will adopt the recommendation from the August 20, 2001, report.

3. OSS Testing: (Report pp. 29-31; Qwest pre-report UNE brief pp. 3-7; AT&T pre-report UNE brief pp. 15-20; Qwest post-report comments pp. 9-10; AT&T post-report comments pp. 13-19)

The issue is whether the SGAT provides adequate testing procedures to support pre-market entry testing of CLEC OSS interfaces.

AT&T testified (2/23/01 Affidavit of Michael Hydock) that, for a number of months, it had been attempting to negotiate a pre-market entry test for the provision of UNE-P with Qwest. The purpose of the test was to give AT&T real-world experience with Qwest's ordering and provisioning systems. AT&T had proposed a

1,000-line test to be conducted in Minnesota. In November 2000, Qwest wrote to AT&T and indicated a willingness to conduct the test (Exhibit I, Affidavit of Michael Hydock). However, Qwest expressed a number of concerns about AT&T's test proposal.

Additional discussions about the proposed test followed, but no resolution was reached. In February 2001, AT&T took its testing proposal to the Minnesota PUC for mediation. As of the date of Mr. Hydock's Affidavit, no resolution had been reached. Mr. Hydock concluded that either Qwest does not want to pursue the test or it simply does not have the business processes in place to accommodate the testing of its services. Mr. Hydock recommended that the SGAT be modified to accommodate CLEC needs for flexible testing of UNE or unbundled network element platform (UNE-P) based service.

Qwest's testimony (3/9/01 Rebuttal of Karen A. Stewart) stated that it engages in extensive testing with CLECs during electronic data interexchange (EDI) development. This includes connectivity testing, stand-alone testing, interoperability testing, controlled production testing, and a managed introduction process. This allows Qwest and the CLEC to fully test each product the CLEC plans to offer, each type of activity, and every type of response. Qwest stated that AT&T is seeking to duplicate the work of the ROC OSS test. Qwest claimed that AT&T would learn nothing from the proposed Minnesota test that it wouldn't learn from Qwest's EDI implementation testing.

For the workshop, Qwest submitted new SGAT language to certify that CLEC "OSS would be capable of interacting smoothly and efficiently with Qwest's OSS" (WK3-QWE-KAS-7). Qwest indicated that the new SGAT language would codify its current EDI testing, plus it added a new "stand-alone" test (3/28/01 Tr. p. 4).

Although AT&T had no SGAT language to propose for the workshop, it considered Qwest's proposal "lacking in the breadth of types of testing that AT&T feels is required for UNE-P" (3/28/01 Tr. p. 6). AT&T said it required a "1,000-line test with multiple scenarios over a period of six months . . . the third party ROC test has less than 200 lines and a smaller number of scenarios than what AT&T would like to perform" (3/28/01 Tr. p. 8).

When asked by Mr. Antonuk (workshop facilitator, Liberty) whether AT&T believed the ROC Test was insufficient, AT&T responded as follows:

> The key question is whether AT&T would feel comfortable entering a market without having gone through its own test. We have back room operations that need to be tested, customer service folks that need to be acquainted with the ILECs' business rules and practice. Those are the kinds of items that we would want to test before we enter a marketplace. The ROC may do a reasonable test of Qwest's OSS systems, but that's not really a pre-market test, that's a test to ascertain whether Qwest has met some 271 guidelines, whether those UNE-Ps are actually available and ready for provisioning and testing and sales.
> (3/28/01 Tr. p. 9)

Mr. Antonuk then asked whether these testing concerns had been discussed with the ROC. AT&T stated, "We have not talked to the ROC directly." Qwest stated, "I don't think anyone has raised the issue in front of the ROC . . . Really what we think

AT&T is asking to do here is to redo the ROC test at the same time the ROC test is run" (3/28/01 Tr. pp. 10-11).

After some discussion, Mr. Antonuk indicated that he understood AT&T's concern about whether its "side of the OSS fence is going to function." At the same time, Mr. Antonuk indicated concern that AT&T was attempting "to persuade the test that relates to 271 compliance to go a different way than it is" (3/28/01 Tr. pp. 17-18). Thus, it appeared that Mr. Antonuk was open to seeing additional OSS testing included in the SGAT, but he was hesitant to allow the results of such testing to affect 271 compliance.

After additional discussion, AT&T indicated it would propose SGAT testing language in a late-filed exhibit. Qwest and AT&T agreed to brief the issues rather than continue cross-examination at a subsequent workshop. When AT&T proposed its SGAT testing language, there was considerable expansion over the testing that Qwest had proposed at the workshop. While Qwest's proposal covered approximately one and one-half pages in the SGAT, AT&T's proposal was more than five pages long (WS3-ATT-MFH-2). Three pages of AT&T's language described a new proposal – "comprehensive production testing."

In its brief (p.16), AT&T states that the basis of its SGAT proposal is "to make the test language that Qwest proposed clearer." AT&T states that although its proposal is necessary to meet checklist item 2, "language in the SGAT (a paper promise) is insufficient." To obtain a finding of compliance with checklist item 2, "the stand-alone testing environment should also be tested by the independent third-party as part of the OSS test" (brief pp. 17-18).

In its brief, Qwest notes that the Minnesota testing issue has recently been resolved and both companies have entered into an agreement for UNE-P testing. Qwest states the only issue to be addressed at this point is whose testing language to include in the SGAT. Qwest argues that the scope of AT&T's proposal is not necessary to achieve AT&T's stated objective of evaluating how its systems will interact with Qwest under real market conditions. Qwest argues that AT&T's newly proposed comprehensive production test is duplicative of the pseudo-CLEC testing in the ROC test.

Qwest also states that AT&T's proposal to test UNE-P does not support AT&T's business plan of using its own facilities to connect to Qwest's subloops. Qwest is willing to negotiate a comprehensive production test procedure based on a CLEC's legitimate business plans - if the test does not duplicate the ROC OSS test. Qwest is also concerned about AT&T's proposal containing non-standard references and unidentified interfaces such as common object request broker architecture (COBRA) (brief p. 6).

Liberty states that AT&T's proposal would adopt a prescriptive approach to comprehensive testing that would not allow for negotiation between Qwest and CLECs with respect to test scope, conditions, or payment responsibility. It also contains no provision for dealing with requested tests that duplicate other test activities. Moreover, adopting AT&T's language now could prove disruptive to the

ROC OSS test now underway. Liberty notes that there could be circumstances where a CLEC has a particular need for testing beyond what is already contemplated by the SGAT. In rejecting AT&T's testing language, Liberty recommended the following SGAT language to provide for negotiations, plus a dispute resolution process, when CLECs believe additional testing is necessary:

> Upon request by a CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, the CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.

Liberty states that the above procedure, given the resource consumption required by the current ROC OSS test, would not be available until after the first consideration of the ROC test results by the FCC.

In its post-report comments, Qwest states it would add the language proposed by Liberty to the SGAT. Qwest would also include other consensus testing language that Qwest and AT&T have agreed upon outside of the seven-state collaborative.

AT&T states, in its post-report comments, that Liberty created language that makes any test more difficult and ignores past problems encountered by AT&T. Instead of the SGAT spelling out specific test language, the CLEC and Qwest must negotiate test language. AT&T had proposed comprehensive test language because Qwest refused for months to conduct a comprehensive test in Minnesota. Liberty's resolution would require CLECs to argue with Qwest at length over test procedures, stalling CLEC market entry. AT&T also states that Liberty's proposal imposes all testing costs on the CLEC. AT&T believes each party should bear its own costs. Alternatively, if Liberty's proposal is adopted, the assignment of costs should be part of negotiations and subject to dispute resolution.

Liberty's resolution distinguishes between two important facets of the testing issue. The first facet is what testing procedures need to be further defined in the SGAT. Both Qwest and AT&T agree that further language is appropriate, although AT&T had nothing to propose at the time of the workshop. After the parties agreed the issue could be briefed (3/38/01 Tr. pp 29-31), AT&T filed extensive revisions to Qwest's testing language. AT&T's revisions included a prescriptive formula for a new "comprehensive production test." Liberty rejected AT&T's formula in favor of a negotiated approach for additional testing. Staff suggests the flexibility of a negotiated approach would be more useful to the overall CLEC community, who will have different business plans than AT&T. However, AT&T would still be free to negotiate more specific or rigorous testing to suit its own needs.

The second facet is whether the results of testing should affect 271 compliance. AT&T continues to maintain that the stand-alone environment should be tested as part of the OSS test. However, at the workshop, AT&T stated that it had not talked to the ROC about its concerns. There is no indication in the record that, even now, the ROC knows of AT&T's concerns. Nevertheless, it would appear that assuring that appropriate testing protocols are included in the SGAT is the proper role of this collaborative. Judging the results of testing is the role of the ROC collaborative. Liberty's resolution precludes any additional negotiated testing until after the first consideration of the RCC test results by the FCC.

There is also a third facet of the testing issue that the Board has considered. To a major extent, Liberty's negotiated testing approach will assign the costs of testing to CLECs. AT&T disagrees stating that Qwest and CLECs should pay their own costs. Alternatively, AT&T states that the assignment of costs should be part of the negotiations and subject to dispute resolution. Staff suggests that testing is a service CLECs buy from Qwest. As such, CLECs should bear the costs of the testing.

The Board will adopt Liberty's resolution of the OSS testing issue. The Board will also accept Qwest's changes, under SGAT section 12.2.9, found in its Compliance Filing dated August 30, 2001.

Checklist Item 4: Access To Unbundled Loops

Issue Deferred to Another Workshop:

1. Accepting Loop Orders with "Minor" Address Discrepancies: (Report pp. 36-37; AT&T post-report comments p. 20)

AT&T encountered problems with address validations. Qwest concedes that AT&T has encountered problems but that they are due to AT&T's system. Liberty stated that Qwest has certain address validation tools and that the parties agreed to a submission of examples of these discrepancies through Qwest's OSS. Liberty pointed out that no party briefed this issue but that these errors were within the scope of the current OSS testing.

AT&T responded that no one briefed this issue as the parties agreed to defer this issue to the ROC OSS test. AT&T wishes to reserve its rights to raise this issue again if the test shows that these errors were not corrected.

Both Liberty and AT&T have come to the same conclusion that the issue should await resolution until completion of the OSS test. Their reasoning differs slightly.

The Board will allow AT&T to raise this issue again at the conclusion of the OSS test if the test shows that these address validation problems have continued.

<u>Issue Resolved During Workshops</u>:

10. <u>Charges for Unloading Loops</u>: (Report p. 40; AT&T post-report comments p. 20)

The SGAT allows Qwest to charge for the unloading of loops. This is necessary to convert loops from voice service to data service. AT&T objected to these charges stating that loops less than 18,000 feet should not have these devices and that Qwest should have removed bridge taps when party-line service was discontinued.

Qwest responded that the *UNE Remand Order* allows for these charges and a federal court case reached the same conclusion. Liberty stated no party briefed the issue and the matter should be closed.

AT&T responded in its comments that this topic is more appropriately suited to a cost case and requested that this issue be deferred to such a case.

The Board will approve Liberty's recommendation that this issue is closed regarding the SGAT language but recognizes that AT&T or other parties may address the issue in a cost docket, as appropriate.

Issues Remaining in Dispute (from report):

1. Standard Loop Provisioning Intervals: (Report pp. 48-51; Qwest Supp. pre-report brief pp. 1, 2, 11-13; AT&T Supp. pre-report brief pp. 2-4; Qwest post-report comments pp. 10-11; AT&T post-report comments – loops pp. 21-29;)

This impasse issue concerns the intervals for installation and repair of various types of loops. The intervals are contained in SGAT Exhibit C. AT&T alleged that the intervals are too long and will inhibit CLEC's ability to compete and are discriminatory. "Specifically, the standard intervals for a 2/4 Wire Analog Loops, a 2/4 Wire Non-Loaded Loops, a DS-1 Loops, and a Repair Intervals for Basic 2-Wire Analog Loops are too long to provide the CLEC a meaningful opportunity to compete, are discriminatory, anticompetitive, and in some cases are contrary to applicable state laws, and place the CLECs in a position where they cannot comply with the established service quality standards that have been adopted by several of the multistate states."

Qwest countered that the intervals were selected after a thorough discussion in the ROC OSS Test selection of performance measurements. Qwest stated that the starting point for the ROC discussion was parity with Qwest's intervals in design of performance measure OP-3 (percent of installations completed on the due date) and for OP-4 (number of days to complete installation). Benchmarks were adopted by the ROC based on Qwest's Standard Installation Guide (SIG). "Furthermore, the FCC has emphasized in its recent orders approving Verizon's Massachusetts application and SBC's Kansas/Oklahoma applications that when benchmarks established in the course of a collaborative proceeding that permits all interested carriers to weigh in, those benchmarks are presumed to give carriers a meaningful opportunity to compete."

AT&T responded that Qwest's SIG was not presented to the ROC and the ROC never approved any Exhibit C standard intervals. AT&T also maintained that it has never been "foreclosed from arguing for shorter intervals and that Qwest's own mean time to installation and repair are shorter than intervals in Exhibit C."

Qwest argued that loop intervals offered in Exhibit C are shorter in almost every instance than those offered by other BOCs. AT&T's expert witness testified that BellSouth offers one to five DS-1 loops in five days, and six to 14 DS-1 loops in seven days. Qwest's maintained that AT&T ignores the fact that BellSouth adds to the seven days "a three days targeted LSR (local service request) processing interval." Thus Qwest maintained that its nine-day interval is actually a day shorter. Qwest stated that neither Verizon nor BellSouth offer a three-day interval equivalent to Qwest's Quick Loop offering. Quick Loop is a two-wire unbundled loop. It is available when coordination and testing are not required to convert existing plain old telephone service (POTS) into UNE loops.

Liberty stated that the evidence demonstrates conclusively that the ROC established its loop installation interval related performance measure (OP-3 and OP-4) through an open and collaborative process that benefited from a full, open, and substantial participation by the CLEC community. Liberty also stated that parity with retail operations is not the appropriate standard in this issue. Rather, the standard should be a meaningful opportunity to compete. Based on the record of the ROC performance deliberations, there is the opportunity to compete. Absent evidence that these intervals are out of date or not effective in providing CLECs an opportunity to compete, they should be accepted.

AT&T pointed out in its supplemental brief that at this time Quick Loops do not include local number portability. AT&T stated that Qwest's commitment to include LNP to the Quick Loop offering is only a paper promise.

The Board will adopt Liberty's finding on loop installation intervals. The CLECs did not present evidence that the install intervals would prevent an opportunity to compete. Additionally, as Liberty noted, the intervals were arrived at through deliberation at the ROC.

2. <u>Loop Provisioning and Repair Intervals – Utah</u>: (Report pp. 51-52; ELI/XO brief pp. 12-13; Qwest pre-report loops brief p. 8; AT&T post-report comments p. 29)

This issue was not one raised by a participant to this (Iowa) proceeding. The Board does not see any need to reach a conclusion on this issue.

3. <u>Reciprocity of Trouble Isolation Charges</u>: (Report p. 52; AT&T pre-report loops brief pp. 21-22; Qwest post-report comments pp. 11-12)

SGAT sections 9.2.5.2 and 9.2.5.3 require CLECs to pay Qwest's costs of isolating the source of network troubles when it is determined that the problem's source is on the CLEC's side of the demarcation point. AT&T objected to the lack of a similar ability to charge Qwest for its own trouble isolation activities in those cases where the problem turns out to be on Qwest's side of the demarcation point. Qwest made changes to the SGAT, which AT&T accepted with two exceptions: (a) AT&T wanted to add language allowing CLEC access to the network interface device (NID) for testing purposes, and (b) AT&T wanted to preserve the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation charges. Liberty proposed and Qwest accepted the following language concerning NIDs:

> Qwest shall allow access to the NID for testing purposes where access at the demarcation point is not adequate to allow testing sufficient to isolate troubles; in the event that Qwest chooses not to allow such access, it shall waive any trouble isolation charges that may otherwise be applicable.

Liberty stated with respect to other issues whose resolution requires consideration of underlying cost studies, nothing in this report should be viewed as constraining or prejudging their merits should they be later raised in cost dockets in the individual states.

The Board agrees that this issue is closed with the addition of the above SGAT language.

4. <u>Delays in the Roll-Out of ASDL and ISDN Capable Loops</u> (Report pp. 52-53; Qwest post-report comments p. 12)

The Board notes that this issue has been deferred and discussed at length in the general terms and conditions report (R-5). The Board will defer any consideration of this issue pending its review of that report.

5. Cooperative Testing Problems (Report pp. 53-54; Rhythms – Kendrick direct testimony p. 6; Qwest – Liston rebuttal testimony p. 66; Qwest post-report comments p. 12)

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations: (a) failure to perform tests, (b) failure to provide test results, (c) failure to provide notification of test performance, and (d) incorrect test results. Rhythms said that it had stopped ordering loops with such testing because of the problems.

Qwest stated that it had not received any customer-specific data that would allow it to validate the specific concerns of Rhythms. However, Qwest also noted that it had undertaken a number of activities to improve its performance in coordinated installations. It cited: (a) identification of personnel training needs based on review of results under Performance Measure OP-13, which deals with coordinated loop installations, (b) a new coordination center dedicated to assisting in coordinated installations, and (c) measures that would avoid the need for coordinated installations.

Liberty notes that Rhythms did not brief this issue. Liberty also stated that the record indicates that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

The Board notes that no objections were filed to Liberty's recommendation. The Board will adopt Liberty’s finding on coordinated loop installations.

6. Spectrum Compatibility (Report pp. 54-61; Qwest pre-report loops brief pp. 20-21, 38-40, and 46-47; AT&T pre-report loops brief pp. 30-35; Rhythms pre-report brief p. 4; Rhythms – Kendrick direct testimony p. 4; Qwest post-report comments pp. 12-14; AT&T post-report comments pp. 29-36)

Spectrum Compatibility concerns loop plant administration and deployment practices that are designed in order for the ability of multiple carriers to send signals on separate cables contained in a binder group without causing interference with the signals carried on other cables in the binder group. The issue was divided into three sub-issues: 1) Treatment of T1s, 2) Remote digital subscriber line (DSL) Deployment, and 3) network channel/network channel interface (NC/NCI) codes on local service requests (LSR).

1) Treatment of T1s

Rhythms testified that SGAT Section 9.2.2.7 is not consistent with FCC requirements, because it gives Qwest the power to segregate traffic based on Qwest’s own needs. Rhythms brief said that the principal difference between it and Qwest on this issue was that Qwest would give preference to pre-existing sources of interference (primarily T1 lines), while Rhythms would create a level playing field for newly-deployed services, regardless of whether they had the advantage of being the first located on the common facility. Rhythms said that as a “known disturber,” T1s must be treated differently by segregating them into separate binder groups within a cable, or by eliminating them entirely. Rhythms said that the FCC has empowered states to adopt either approach, citing paragraph 281 of the Third Advanced Services Order.

AT&T argues that Rhythms approach is neither prescriptive nor immediate, requiring only that T1s be replaced where they cause interference. AT&T argued that allowing Qwest to seek a waiver (from state commissions) of the T1 removal requirement on a showing that Qwest has no available alternative in a particular case could solve the dispute between Rhythms and Qwest about whether T1s could always be replaced.

Qwest stated that it already complies with FCC policy of segregating T1 facilities. Qwest explained, at the workshop, its practice is to place repeated T1 services in binder groups by themselves. Qwest's method for deployment of T1 facilities is to place the T1s in separate binder groups on separate sides of the cable. In Qwest's feeder network, large cables are made up of 100 pair binder cables. In an 1800 pair cable, there will be 18 binder groups. Qwest places T1s in the outside binder groups and separates transmit and receive to opposite sides of the cable to decrease potential interference. Qwest also said, when such management efforts fail, it has committed in SGAT Section 9.2.6.5 to change a disturbing T1 to an HDSL facility wherever possible.

Liberty noted that Qwest already (a) places T1s in binder groups that minimize interference possibilities and (b) replaces T1s that are causing disturbances with another technology wherever possible. Liberty proposed and Qwest agreed to modify SGAT Section 9.2.6.4 to read:

> Qwest recognizes that the analog T1 service traditionally used within its networks is a “known disturber” as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner that minimizes interference. Where such placement is insufficient to eliminate interference that disrupts other services being provided, Qwest shall whenever it is technically feasible, replace its T1s with a technology that will eliminate undue interference problems. Qwest also agrees that any future "known disturbers" defined by the FCC or the Commission will be managed as required by FCC rules.

The Board agrees that Liberty's changes to the SGAT 9.2.6.4 are an appropriate resolution. AT&T did suggest that the last sentence include "and orders and industry standards." (AT&T’s Exceptions and Comments on Workshop 3, p. 30) SGAT section 9.2.6.4 is complete without this addition. The FCC and State Commissions will have the benefits of any new industry standards and orders brought before them in any formal complaints involving T1 disturbances.

The Board will adopt Liberty's resolution for this issue.

<u>2) Remote DSL Deployment</u>

The use of remote DSL with its repeaters by Qwest to serve less dense areas has led to spectrum compatibility problems for CLECs wishing to deploy their own Advanced Services to the same areas. The FCC has contracted with NRIC (Network Reliability and Interoperability Council) to report back to the FCC regarding this issue with a report anticipated by January 2002.

AT&T claimed that Qwest, through its remote DSL deployment, will inhibit and delay deployment of Advanced Services by other providers in remote areas. AT&T stated that, “Following the deployment of Qwest DSL at a remote terminal, the sole option for advanced services would be for the customer to purchase services from Qwest." AT&T stated that by the time the NRIC report comes out with guidelines that the FCC may order, Qwest will have tied up deployment of advanced service for itself. AT&T claimed that the current T1.417 standard informs how a carrier would deploy intermediate devices and remote xDSL in a spectrally compatible manner. AT&T stated that state commissions should require Qwest to deploy remote DSL technology in a manner that will minimize spectrum compatibility issues in the future. AT&T objected to the idea of CLECs informing Qwest where they intend to rollout advanced services to remote areas so that steps might be taken by Qwest to minimize interference.

Liberty stated that Rhythms and AT&T have not shown good reason to act in advance of the NRIC report that the FCC expects. Additionally, Liberty pointed out that, in rural states, broad-level standards about network design may prove difficult to reconcile with the benefits of promoting new technology that allows added kinds of services to be delivered across network historically dedicated largely to voice traffic. The impasse comes down to who should pay the cost of removing repeaters and remote DSL when they inhibit the introduction of a competitor's advance services.

Rhythms and AT&T are against informing Qwest of what services they plan to roll out and where, for fear of providing Qwest with information that could be used competitively against them. "Instead they (Rhythms and AT&T) would like Qwest to deploy its network on the assumption that CLECs are making uses that are inconsistent with how Qwest would like to serve its own customer needs with respect to that network."

Liberty indicated that this issue should be resolved by providing that Qwest is obligated to undertake reasonable actions when given specific information about network locations where its own repeater use or remote DSL deployment could disrupt central office-based CLEC DSL service. To resolve this, the facilitator suggested the following language, which Qwest has agreed to add to SGAT Section 9.2.6.

> Where a CLEC demonstrates to Qwest that it has deployed central-office based DSL services serving a reasonably defined area, it shall be entitled to require Qwest to take appropriate measures to mitigate the demonstrable adverse effects on such service that arise from Qwest's use of repeaters or remotely deployed DSL service in that area. It shall be presumed that the costs of such mitigation will not be chargeable to any CLEC or to any other customer; however, Qwest shall have the right to rebut this presumption, which it may do by demonstrating to the Commission by a preponderance of the evidence that the incremental costs of mitigation would be sufficient to cause a substantial effect upon other customers (including but not limited to CLECs securing UNEs) if charged to them. Upon such a showing, the Commission may determine how to apportion responsibility for those costs, including, but not limited to CLECs taking services under this SGAT.

The Board will adopt Liberty's resolution for Remote DSL Deployment. Further, the Board will adopt the additional language for SGAT Section 9.2.6.

<u>3) NC/NCI Codes on LSR</u>

T1E1.4 is an industry standards body, which recently issued its first set of recommendations, T1.417, in which it recommended the use of nine spectrum classes to identify types of advanced services. T1E1.4 then charged the Common Language Group with establishing NCI codes to match the nine spectrum classes. NC/NCI codes are standard industry codes that indicate the type of service deployed on a loop. NC/NCI codes have been used on Local Service Requests (LSR) and Qwest uses them in its spectrum management efforts. Section 9.2.6.2 of the SGAT requires that a CLEC will provide the NC/NCI codes when ordering service:

> When ordering xDSL Loops, CLEC will provide Qwest with the appropriate information using NC/NCI codes to describe the power spectral density mask (PSD) for the type of technology CLEC will deploy. CLEC also agrees to notify Qwest of any change in advanced services technology that results in a change in spectrum management class on the xDSL Loop. Qwest agrees CLEC need not provide the speed or power at which the newly deployed or changed technology will operate if the technology fits within a generic PSD mask.

AT&T stated that spectral mask information is highly proprietary, competitively sensitive information that should not be reported as a routine matter to Qwest on every single order through an NC/NCI code. AT&T gave three reasons for their objection to the NC/NCI codes on LSRs. First, spectral mask data is proprietary because it reveals exactly what kind of service a carrier is providing a particular locale and particular end-user.

Second, spectral mask data is highly unreliable. Even if a CLEC diligently reported spectral mask data, Qwest is making changes to its network every day that would affect spectral masks without the CLEC’s knowledge. AT&T claimed that these changes would pollute the spectral mask information and make it usable.

Third, the FCC requirement cited by Qwest was an interim policy that has no binding or precedental effect. AT&T cites the industry standard T1.417, as doing away with the need of NC/NCI codes for spectrum management. AT&T stated that CLECs should only be required to disclose NC/NCI codes in response to a spectral dispute that involves their facilities.

Rhythms presented SGAT language providing that all carriers, presumably including those who are not parties to the SGAT would simply agree to “deploy services that in compliance with T1.417 and other applicable FCC requirements." Qwest has no need to be informed of the technology CLECs intend to deploy.

According to Qwest's response, the FCC has determined that incumbent LECs need this type of information and the requirement has been codified in 47 C.F.R. § 51.23(b) and (c). Qwest opined that this was due to the possibility of some CLECs not being good spectrum citizens as well as that new types of DSL service, which are especially susceptible to disturbances or that create disturbances, are being deployed. Qwest points out that the requirement that a CLEC inform Qwest of deployment of advanced services technology is not optional, but is required by the FCC’s national spectrum policy.

Liberty reasoned that if Rhythms and AT&T's overall approach to spectrum management had been adopted there would be no need for reporting NC/NCI codes. Those approaches were discussed and rejected. In review they included adoption of the T1E1.4 industry standard and creation of a level playing field by extensive network redesign segregating all known disturbers. Further, Liberty found that Qwest has a legitimate need for the information. The information has value when there is a dispute or uncertainty about the source of interference. Qwest is expected to provide promptly, and to all concerned, specific information about what facilities are involved and who may be using them.

It appears reasonable to conclude that Qwest has a need due to its responsibility to its customers, and to CLEC customers, to identify and respond to interference between services, which having NC/NCI codes would facilitate.

The Board will adopt Liberty's resolution for this issue.

7. Conditioning Charge Refund (Report pp. 61-62; Qwest pre-report loop brief pp. 17-23; AT&T pre-report loop brief p. 61; Qwest post-report comments p. 14; AT&T post-report comments p. 36)

AT&T argued that a CLEC was entitled to a refund of any conditioning of loop charges applicable under SGAT Section 9.2.2.4 if the CLEC customer were to switch back to Qwest. Qwest stated that in the Arizona workshop AT&T had tried to draft language for the SGAT that gives CLECs a refund for these one-time condition costs if the CLEC lost its customer within one year, regardless of why the customer left.

Qwest noted that in Colorado AT&T argued that all CLECs should be required to refund conditioning costs to the carrier that paid for it when the CLEC or Qwest entices an end user away from AT&T. This was opposed in Colorado by New Edge Networks, Inc., Covad, and Qwest who argued that if AT&T was concerned about its customers leaving after it paid for conditioning, the proper mechanism is a Termination Liability Assessment between the carrier and the end user not a refund that inhibits competition.

Qwest argued that it was entitled to recover its costs in conditioning the line and that the loss of a customer by the CLEC could be caused by a number of different factors.

AT&T dropped these approaches and proposed language that the CLEC should be refunded any conditioning charges associated with the requested service if it: (1) never receives the xDSL service, (2) suffers unreasonable delays, or (3) experiences poor quality of service in any case due to Qwest's fault. AT&T considered this provision to constitute a proper incentive to compensate CLECs and to induce Qwest to perform according to SGAT requirements and expectations.

Qwest argued that it was entitled to recover its conditioning costs and that assessing fault would be hard to establish. Qwest stated that the FCC first addressed the issue in the Local Competition Order where it held that, some modification of incumbent LEC facilities, such as loop conditioning is encompassed within the duty imposed by section 251(c)(3). The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning. Additionally, terms such as poor quality or unreasonable delay were too vague.

Liberty proposed, and Qwest accepted, the following language to be added to the SGAT:

> Where Qwest fails to meet a due date for performing loop conditioning, CLEC shall be entitled to a credit equal to the amount of any conditioning charges applied, where it does not secure unbundled loop involved within three months of such due date. Where Qwest does not perform conditioning in accord with the standards applicable under this SGAT, CLEC shall be entitled to a credit of one-half of the

> conditioning charges made unless CLEC can demonstrate that the loop as conditioned is incapable of substantially performing the functions normally within the parameters applicable to such loop as this SGAT requires Qwest to deliver it to CLEC. In the case of such a fundamental failure, CLEC shall be entitled to a credit of all conditioning charges, except where CLEC asks Qwest to cure any defect and Qwest does so. In the case of a cure, CLEC shall be entitled to the one-half credit identified above.

The Board will adopt the Liberty resolution to this issue.

8. Pre-Order Mechanized Loop Testing (Report pp. 62-64; Qwest pre-report loop brief pp. 24-28; AT&T pre-report loop brief pp. 16-18; Qwest post-report comments pp. 14-15; AT&T post-report comments pp. 36-40)

Mechanized loop testing (MLT) enables a carrier to test a loop and obtain information on loop length and performance metrics. AT&T stated that a CLEC needs the ability to perform the test or to have it performed on its behalf in order to verify the loop can support the services the CLEC intends to provide over that loop facility.

Qwest opposed this demand, arguing: (1) its retail representatives cannot perform an MLT on a pre-order basis; (2) MLTs are performed as a part of repair; (3) an MLT is an invasive test that takes the customer's service down for a period of time; (4) it is a switch based test that requires the loop to be connected to Qwest's switch; (5) no other Bell Operating Company (BOC) provides CLECs with a pre-order MLT; and (6) Qwest has already given CLECs MLT information in the Raw Loop Data (RLD) tool.

Qwest did a one-time test of its networks and that data is available to the CLEC in the RLD tool. Qwest stated that its own retail sales employees do not have the ability to perform pre-order MLTs and do not even have access to MLT information. They have less access than CLECs to loop makeup information, because Qwest retail representatives do not have access to raw loop data or MLT distance.

Liberty pointed out that this information is available through another tool, which the CLEC may use. The fact that Qwest does not perform MLT test on its own pre-orders overshadows the question of discrimination. “AT&T has presented no evidence to rebut Qwest's claim that it provides CLECs with the same information from the same sources, and in the same manner as is available to its own personnel in the pre-order context.”

Qwest cited the following as examples of what incumbents must provide and what Qwest’s Loop Qualification Tool provides to CLECs:

- The loop’s material, e.g. fiber or copper;
- The location and type of any electronic or other equipment on the loop, e.g. digital loop carrier, feeder distribution interfaces, bridge taps, load coils, and pair-gain devices;
- A loop’s length segmented by transmission media type;
- Wire gauge;
- Electrical parameters.

Thus, Liberty concluded that Qwest should not be required to make mechanized line testing available for CLECs so long as it does not perform the testing for itself or its affiliates. AT&T has not presented evidence of a need for specific information that is not available through other available tools.

The Board will adopt Liberty's resolution to this issue.

9. Access to LFACS and Other Loop Information Databases (Report pp. 64-66; Qwest pre-report loop brief pp. 24-35; AT&T pre-report loop brief pp. 40-43; Qwest post-report comments p. 15; AT&T post-report comments pp. 40-43)

AT&T sought access to LFACS (Loop Facilities Assignment and Control System) which is a database of information on copper loops or partial loops that can be combined in order to deliver xDSL service to customers who may be in an area that is served by Qwest's integrated digital loop carrier (IDLC) loops. As discussed earlier in this memo, IDLC technology has spectrum compatibility issues with xDSL. AT&T stated that Qwest has access to information in their LFACS that would allow CLECs to know if it is possible to find enough copper loops that are spare in order to avoid not being able to deliver a service after they have marketed in those areas.

Qwest countered that its own pre-order group does not have access to the LFACS. Qwest stated that if ordered to provide direct access to LFACS, Qwest would have to substantially modify the LFACS database to make it perform functions it cannot perform now. Qwest argued that there are no FCC orders that require the incumbent LECs to provide direct access to its back office databases, particularly where the incumbent makes loop makeup information in its back office system available to the CLEC as Qwest does with the RLD tools.

The RLD is populated with information taken directly from the loop qualifications database. The loop qualifications database is used for both wholesale and retail qualification tools and receives data directly from LFACS. As with the pre-order MLT, Qwest stated that retail sales representatives do not have access to LFACS on a pre-order basis.

LFACS is a provisioning tool and is only accessed once Qwest actually places an order. Qwest stated that it uses LFACS in an identical manner for CLECs. Once the CLEC places an order, Qwest uses the same provisioning process for CLECs as for itself.

Qwest argued that the LFACS system contains confidential information about Qwest and other CLECs. Qwest finally argued that the LFACS does not have the search functionality AT&T suggests. To create that functionality would require a major overhaul of LFACS. Both Qwest and the CLECS have access to "Facility Check," which is a searchable tool that permits CLECs to determine what facilities are available.

Liberty noted that parity between the CLECs and Qwest's preorder group is not a material issue, due to the fact that Qwest does not have to deal with the issue of finding out where IDLC is deployed or if they have spare pairs to install xDSL. Liberty also pointed out that there is sufficient evidence that Qwest's deployment of a large amount of IDLC into an area is a concern to CLECs wishing to determine if there are spare loops into the same area.

Liberty concluded that the LFACS does not contain the information AT&T seeks. It does contain a very broad range of information that is both sensitive and hard to exclude from unmediated access. The Facilitator recommended the following language for the SGAT, which Qwest has agreed to add:

> In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLECs ability to provide service through available copper facilities on a broad scale, the CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such available copper facilities. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information. CLEC shall be responsible for Qwest's incremental costs to provide such information or access mediation.

AT&T responded in their supplemental filing that the Facilitator's resolution is too limiting. AT&T points to the FCC UNE Remand Order, which stated in part;

> Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records.

Accordingly, AT&T recommends that the Facilitator's proposed SGAT language be revised as follows:

> Qwest shall provide to CLEC on a non-discriminatory basis access to all company's records, back office systems and databases where loop or loop plant information, including information relating to spare facilities, resides that is accessible to any Qwest employee or any affiliate of Qwest. CLECs shall have the ability to audit Qwest's company records, back office systems and databases in each state to determine that Qwest is providing the same access to loop and loop plant information to CLECs that any Qwest employee has access. Such audits will be in addition to the

> audit rights contemplated by Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18.

AT&T also stated that the Facilitator language allowing Qwest to mediate the access by CLECs and then charge for such mediation is not provided for in FCC rulings. AT&T stated a better approach is to limit the CLECs access to and use of any information derived from their access. AT&T proposed the following language:

> CLEC agrees the access afforded to CLEC to Qwest's records, back office systems and databases and the use by the CLEC of any information obtained under this section shall be limited to performing loop qualification and spare facilities check.

The Board agrees that parity is not the appropriate standard. The information needs of a CLEC could be different from those of Qwest in making decisions to begin marketing in an area that is served by IDLC. AT&T has not presented evidence that it is not receiving "underlying information that the incumbent LEC has . . " (FCC UNE Remand Order) that it is not already receiving from other tools. The language that Liberty has proposed reinforces the general right to "gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such available copper facilities." SGAT Section 18-Audit Process would be available to CLECs in case information obtained from Qwest was in some way deficient. AT&T's proposed language appears to be too broad. The Board will adopt the language proposed by Liberty, while noting that there is no specific location identified for the addition to the SGAT.

Line Splitting

Issues Decided In Earlier Workshops

1. Line-At-a-Time Access to Splitter (Report p. 67; Qwest pre-report line-splitting brief pp. 4-6; AT&T pre-report line-splitting brief pp. 36-42; AT&T post-report comments pp. 43-48)

AT&T commented on the Fourth Report on line splitting that Qwest should be obligated to provide access to "outboard" splitters (i.e., splitters that are not integrated into the DSLAM) in its central offices and remote terminals. AT&T also said that CLECs should be able to gain access to them for a single line or a single shelf.

Liberty included this issue in the “Issues Decided in Earlier Workshops–Line Splitting,” pointing out that the issue is the same as was brought up in “Ownership of and Access to Splitters” in the June 11, 2001, Report-Emerging Services. In Report 3, Liberty quoted Qwest that the FCC has upheld the position that ILECs need not provide access to their splitters in the SWBT 271 Order. Paragraph 327 of that order stated that:

> We [the FCC] did not identify any circumstances in which the splitter would be treated as part of the loop. (SBC Texas Order ¶ 327)

AT&T did not brief the issue for the third report and the Facilitator stated that there is no evidence to support AT&T’s contention that CLEC installation of splitters would impose distance, cable length, or central office space problems.

AT&T stated that in the Colorado Loop Workshop Qwest finally revealed the type of splitter it deploys in its network and that splitter has the technical ability to be broken out of the digital subscriber line access multiplexer (DSLAM). AT&T stated that since the splitter can be separated from the DSLAM, then Qwest should make this splitter access available. AT&T stated that the FCC position that the loop includes “attached electronics” if such electronics are necessary to fully access the loop features, functions, and capabilities in order to provide service to end users, then AT&T should have access to the splitter as an access point.

Qwest stated that the FCC has rejected AT&T‘s argument for LECs making available a splitter on a line at a time basis in SBC Texas Order ¶ 327 when it stated:

> We reject AT&T’s argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over UNE-P. The Commission has never exercised its legislative rulemaking authority under Section 251 (d) (2) to require incumbent LECs to provide access to the splitter, and the incumbent LECs therefore have no current obligation to make the splitter available. (SBC Texas Order ¶ 327)

Qwest stated that this position was further supported by the *Line Sharing Order*, which is the basis for the line splitting requirement. In that order, the FCC held that ILECs have the option of providing line splitters themselves or, in the alternative, allowing CLECs to place their splitters in the ILEC’s central offices. (*Line Sharing Order ¶ 146)*

Noting the FCC ruling, Liberty considers this issue closed.

The Board agrees with Liberty and would also note that AT&T still has not presented evidence that installing its own splitter (which the record points out are passive filters) and the required distribution frame wiring would be either a great expense or cause substantial delays and in any other ways hinder competition.

2. Discontinuing Megabit Service (Report p. 67; AT&T pre-report line-splitting brief pp. 42-44)

AT&T objected to Qwest's policy of discontinuing the Megabit service to its own end user when they switched to a CLEC for voice service. This is the same issue as was discussed in the June 11, 2001, Report - Emerging Services. In that report Liberty stated that it appears that the FCC has not ordered the sharing of the low frequency (voice) portion of the loop. Liberty further indicated that Qwest should not be precluded in sharing that portion because the FCC did not order it and that this issue should be discussed in the Public Policy portion of these proceedings. Liberty indicated that this issue was closed until that report.

The Board agrees with Liberty that it appears Qwest’s reluctance to make the voice portion available is an attempt by Qwest to limit competition. As indicated, this issue will again be discussed in the Public Policy Report.

Issues Remaining In Dispute

1. Limiting Line Sharing to UNE-P (Report pp. 68-69; Qwest pre-report line-splitting brief pp. 10-12; AT&T pre-report line-splitting brief pp. 28-33; Qwest post-report comments p. 16; AT&T post-report comments pp. 48-52)

AT&T objected to line splitting being limited to UNE-P and that line splitting should available on unbundled loops, enhanced extended links (EEL), and resold loops. Qwest has agreed to develop a standard offering for loop splitting that is contained in SGAT Section 9.24.

With regard to EEL line splitting, the record indicates that the demand for this service is very low. There are only seven EEL that have been split and they all reside in Utah. AT&T suggests that without a split EEL as a standard product there would be no demand. Qwest countered that split EEL can be handled by SRP (Special Request Process). At the time there appears to be a demand, then the large expenses of preparing OSS, billing and other processes related to a standard offering would be justified.

Qwest objected to splitting resale loops. Qwest stated that it has no obligation to provide combinations of unbundled network elements with resale products. The FCC requires ILECs to provide access to checklist items only to meet “reasonable foreseeable demand.” There is no evidence of demand for splitting resold lines. Any need for such a product could be satisfied with Qwest’s existing offerings simply by converting the resale voice grade line to UNE-P voice at which point UNE-P line splitting is available.

Liberty stated that AT&T’s objection to the lack of definitive timetable on loop splitting was not well founded. No evidence was presented that Qwest was not working towards a resolution in order to determine that Qwest is asked to resolve problems or take responsibility for matters of potential disagreement between two CLECs. Liberty stated that, provided that Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress defining specific terms and conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligation under Section 271. Liberty also stated that AT&T has failed to demonstrate a specific EEL offering is appropriate at this point. Lastly, Liberty noted that resold loops are a service not a loop to be split. Liberty pointed out that a UNE-P could be substituted for a resold loop in order to achieve a split function.

The Board considers this issue closed subject to Qwest finalizing the standard offering on split UNE loops by the time of Qwest's 271 filing.

2. Liability for Actions By an Agent (Report pp. 69-70; Qwest pre-report line-splitting brief pp. 12-17; AT&T pre-report line-splitting brief pp. 34-36; Qwest post-report comments p. 16)

Qwest's SGAT section 9.21.7.1, section 9.21.7.2, and section 9.21.7.3 outline the customer of record, its authorized agents to perform ordering and/or maintenance repair functions, and the use of passwords and security devices to be allowed access to work with Qwest on an account. These sections were written to address concerns that two CLECs would both have their own needs to contact Qwest and that going through a customer of record CLEC by the other CLEC would be cumbersome merely to relay matters of more direct concern to the other CLEC. SGAT section 9.21.7.3 spells out that the customer of record may make available security passwords to another CLEC for access through Qwest to the account. Section 9.21.7.3 also provides Qwest with hold harmless protection by actions of an authorized agent unless that access was wrongfully obtained through Qwest. Section 9.21.7.3 states:

> The customer of record shall hold Qwest harmless with regard to any harm to customer of record as a direct and proximate result of the acts or omissions of the authorized agent of the customer of record or any person who has obtained from the customer of record the necessary access

> and security devices through the customer of record, including but not limited to user identifications, digital certificates and SecurID cards, that allow such person to access the records of the customer of record unless such access and security devices were wrongfully obtained by such person through the willful or negligent behavior of Qwest.

AT&T seeks to remove the word "wrongfully" from section 9.21.7.3 because it requires a showing that the third party CLEC had “wrongfully” used the security devices.

Qwest argued that the word "wrongfully" carves out two exceptions to the hold harmless in section 9.21.7.3. First, the person who obtains access is someone who is not authorized to obtain access or who "wrongfully" obtains access. If the access is wrongful, it is authorized and Qwest should be held harmless. Second, it would only be fair to hold Qwest liable if Qwest deliberately allowed the wrong person access or, even if Qwest did not actually intend to give the wrong person access, that person obtained access because Qwest was negligent. Both willful and negligent are necessary in order to describe intentional conduct and conduct while not intentional, was substandard enough that Qwest should not be held harmless.

Liberty found that there is no apparent reason why Qwest should bear any responsibility, even if some negligence theory could be supported, for harm to a CLEC from the CLECs agent’s or representative’s use of such information that the CLEC intentionally and “rightfully” gave to the person in question.

The Board agrees with Liberty that this issue should be considered closed with the SGAT section 9.21.7.3 hold harmless exception constructed with the “wrongful” exception as indicated above.

Network Interface Device (NID)

Issues Remaining In Dispute

1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities (Report pp. 72-73; Qwest pre-report NID brief pp. 20-24; AT&T pre-report NID brief pp. 44-52; Qwest post-report comments pp. 16-17; AT&T post-report comments pp. 52-56)

This impasse issue centers on a determination of an appropriate definition of “NID” in SGAT section 9.5.1. The Board notes that variations of this issue were at impasse in the two previous reports. See Collocation issue # 4 in Liberty’s second report and Subloop Unbundling issues #1 and #2 in the Liberty third report. For each of these issues, Liberty ruled in favor of Qwest.

The definition of the NID is an issue to AT&T because it could impact its method of providing competitive service. AT&T will provide service through a hybrid fiber-coaxial (“HFC”) network - also known as its cable telephony product. This network will need to be connected to Qwest’s subloop facilities and inside wiring at MTEs - or multi tenant environments. NIDs are the interconnection points to subloops and inside wiring. AT&T has argued that the SGAT’s access requirements to NIDs could preclude it from providing MTE customers timely service.

AT&T notes that the FCC’s *First Report and Order*, at paragraph 392, referred to a NID as "a cross-connect device used to connect loop facilities to inside wiring."

Subsequently, the *UNE Remand Order*, at paragraph 233, broadened the definition "to include all the features, functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism." AT&T asserts that the SGAT adopts the definition of NID in the *First Report and Order* instead of the definition in the *UNE Remand Order* (Br. p. 48).

AT&T argues that the SGAT provides a lack of access to the NID. However, it is important to note that the SGAT does not preclude access, it merely sets varying access protocols for different types "terminals" that are located in or near the MTE. According to Qwest, some of these terminals are NIDs and some are not (Tr. p. 48, 5/4/01). SGAT section 9.5.1 defines the NID as the terminal that separates Qwest's network from inside wiring not owned by Qwest. For such a NID, CLEC access requirements are virtually non-existent (see SGAT section 9.5.2.1.1). AT&T wants this type of access for all terminals in or near a MTE.

SGAT section 9.3 (Subloop Unbundling) defines the other class of terminals that AT&T wants to call NIDs. If Qwest owns the inside wiring between the terminal and the customer, then Qwest does not consider the terminal a NID. In this case, the inside wiring is a subloop and Qwest leases the subloop and terminal together as a package. Access requirements are more rigorous, requiring LSRs and in some cases collocation.

Subloop terminals have stricter access requirements because they "sit within Qwest's network and, because CLEC activity in these terminals affect Qwest's network, the SGAT contains processes for access that also provides Qwest with essential information it needs to adequately maintain the network" (Qwest Br. p.18). Qwest contends that AT&T is attempting to define subloop terminals as NIDs to avoid the FCC's collocation rules.

Liberty ruled in favor of Qwest's interpretation of what the FCC meant by NID. Liberty also affirmed its earlier resolutions relating to this issue. However, Liberty did indicate that actual implementation would determine whether a future need might exist to further define access and collocation requirements.

AT&T is not being denied access to the NID or terminal. The SGAT has different access requirements for the different types of terminals. Because the NID is the endpoint of Qwest's network, there is less concern about CLEC access affecting the network. Therefore, access requirements are minimal. There are other terminals similar to NIDs, but Qwest's network extends beyond these terminals in the form of subloops. Qwest is rightly concerned that unfettered access to these terminals could affect the network. Therefore, Qwest has constructed stricter access requirements in SGAT section 9.3. Finally there are detached terminals, which may be located some distance from the MTE. For these terminals, Qwest's network concerns are more pronounced, and the SGAT requires additional access protocols including collocation.

It appears that AT&T would like to call each of these terminals a NID in order to reduce or eliminate access requirements. AT&T relies on a strained interpretation of the *UNE Remand Order*'s definition of a NID to support its position. Liberty's resolution decides the issue based on concerns of "service reliability, safety, work efficiency, cost, and engineering" (Report p. 73). Liberty's resolution assures CLEC access to each terminal, while affirming Qwest's right to set different access requirements for different types of terminals.

The Board will adopt Liberty's ruling that Qwest has proposed an appropriate definition of NID in SGAT section 9.5.1.

2. Protector Connections (Report pp. 73-74; AT&T pre-report NID brief pp. 52-53; Qwest post-report comments p. 17; AT&T post-report comments pp. 56-59)

Should a carrier be permitted to remove another carrier's unused loop from a NID to free-up capacity? In the initial testimony on this issue (Liston Direct, pp. 65-66, 1/19/01), citing the FCC's *UNE Remand Order* (Appendix C, pp. 4-5), Qwest stated that it was under no obligation to remove unused loops from a NID. If NID space is unavailable, Qwest stated the CLEC could provide a new NID and connect to the loop or inside wire at any technically feasible location.

In its testimony (3/23/01 Comments on Loops, Line Splitting, and NID), AT&T stated that the *UNE Remand Order*, at paragraph 232, indicated that it is unreasonable to require a CLEC to provide its own NID.

In response (Liston Rebuttal, pp. 79-81, 4/18/01), Qwest stated that AT&T has the option of installing its own NID or paying Qwest to do so. Then AT&T can make a NID to NID connection. Qwest stated that NID to NID connections conform to the National Electrical Code.

At the workshop (Tr. pp. 82-83, 5/4/01), AT&T indicated that the issue was no longer at impasse, because it had decided to provide its own NID in all circumstances. Nevertheless, AT&T's witness indicated that CLECs should be permitted to remove unused loops from a NID to free-up capacity.

Qwest never briefed the issue. AT&T briefed the issue, stating that based on other workshops, the issue was in still dispute. AT&T asked Liberty to resolve the issue and proposed modifying the final sentence of SGAT section 9.5.2.1 as follows:

> At no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities.

With its brief, AT&T submitted a Bell Systems document that explicitly supports "capping off" loop facilities.

Liberty notes that the Bell Systems document had not been authenticated and that no witness had testified to its general applicability to all of the relevant configurations at issue. Liberty also notes that its significance and the requirements associated with its implementation are not clear. Additionally, Liberty notes that AT&T's proposed SGAT change would permit "capping off" of Qwest's loop facilities, but the term is undefined. Thus, Liberty denies AT&T's proposal to modify SGAT section 9.5.2.1.

In its comments, AT&T refutes Qwest's assertion that removing unused loops from the NID could violate the National Electrical Code. AT&T also defends and explains the "capping off" proposal from its brief, stating that the procedure would not present an electrical hazard. AT&T concludes that Qwest has never presented any viable technical concerns to AT&T's proposal to allow CLECs to remove unused loops from a NID. AT&T continues to propose modifying the final sentence of SGAT section 9.5.2.1 as shown above.

The main concern with AT&T's proposal is timing. AT&T forfeited its opportunity to argue the issue at the workshops. In reviving the issue, AT&T has now filed what amounts to technical testimony regarding electrical safety and the National Electrical Code. This "testimony" is presented for the first time in AT&T's Comments to Liberty's Report. Qwest is left with no opportunity to challenge this testimony unless the Board specifically orders another round of briefs.

The Board's August 10, 2000, "Order Establishing Procedural Schedule and Adopting Multi-State Process", in Docket No. INU-00-2, states the following about the resolution process for unresolved issues:

> If the parties are unable to reach agreement on an issue, then the issue shall be considered "Unresolved." <u>Once an issue is considered to be in agreement during the workshop process, it will not be reopened unless new information or evidence, not previously available to the parties, justifies reopening the issue.</u> (emphasis added)

Essentially, AT&T wants the Board to reopen this issue. However, the standard for reopening an issue is the emergence of new information or evidence not previously available to the parties. For example, the FCC could release an order after an issue had been discussed at a workshop, which provides new guidance on the issue. In contrast, the information AT&T has presented on electrical safety and the National Electrical Code clearly was available at the time the issue was scheduled for discussion at the May 4, 2001, workshop. Therefore, It would appear that the Board could refuse to reopen this issue because AT&T has not presented information or evidence not previously available to the parties.

The Board will adopt Liberty's resolution for this issue. The Board notes that the information provided by AT&T in its Comments to Liberty's Report fails to meet the standards for reopening an issue as stated in the Board's August 10, 2000, order in Docket No. INU-00-2.

3. CLEC Use of Qwest's NID Protector Without Payment (Report p. 74; AT&T pre-report NID brief pp. 53-54; Qwest post-report comments pp. 17-18)

The Board will adopt the recommendation from the August 20, 2001, report.

Checklist Item 5: Access to Unbundled Local Transport

Issues Remaining in Dispute

1. SONET Add/Drop Multiplexing (Report pp. 76-77; Qwest post-report comments p. 18; AT&T post-report comments pp. 59-60)

AT&T stated in its comments to Liberty's report that Qwest and AT&T agreed to language to resolve this issue. This issue is considered closed.

2. EUDIT/UDIT Distinction (Report pp. 77-79; Qwest pre-report transport brief pp. 31-33; AT&T pre-report transport brief pp. 41-44; Qwest post-report comments pp. 18-19; AT&T post-report comments pp. 60-65)

The issue at impasse is whether Qwest should distinguish between UDIT (Unbundled Dedicated Interoffice Transport) and EUDIT (Extended Unbundled Dedicated Interoffice Transport). AT&T argues that dedicated transport consists of a single element that should not be separated. AT&T cited the Local Competition Order at paragraph 440:

> [I]ncumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWC), SWCs and IXC POPs, tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers.

UDIT is for dedicated transport between wire centers owned by Qwest. EUDIT is the same as UDIT except one end of the transport trunk is not a Qwest owned wire center but rather a wire center owned by a CLEC or IXC. UDIT is priced on a distance-sensitive basis, while the pricing for EUDIT is not distance sensitive. AT&T argues that both UDIT and EUDIT should be priced on a distance-sensitive basis and that Qwest should not be permitted to carry over from the access world the average pricing reflected in non-distance-sensitive EUDIT pricing. AT&T states that such pricing is not cost based, is discriminatory, and discourages CLECs from mid-span meets in EUDIT situations (because the CLEC will pay the same for EUDIT whether or not it builds much of the way toward the point of interconnection).

Qwest confirmed that it made the distinction between UDIT and EUDIT as a way to preserve the historical pricing differences between the two. Qwest agreed that acceptance of this distinction is not sought here; it is willing to allow the question of the costs for these facilities to be decided in cost dockets before the individual commissions.

In Liberty's report, it states that Qwest agrees that UDIT and EUDIT are not separate UNEs, but rather a single UNE with two distinct pricing components. Also, it states that the issue of whether the historical method of pricing entrance facilities continues to be appropriate in the context of providing interoffice transport is a legitimate issue. With this in mind, Liberty agrees that this forum is not the right one for determining whether the pricing for EUDIT is appropriate.

AT&T's comments on the report state that Liberty has ignored the problem. AT&T states that the FCC has identified dedicated transport as a network element. The FCC did not make a distinction between dedicated transport between ILEC wire centers and dedicated transport between an ILEC wire center and a CLEC wire center. It is all defined as dedicated transport. AT&T argues that there is no legal basis to make such distinctions, and such distinction creates unintended consequences, to the CLEC's detriment, and perpetuates an outdated rate structure that is inapplicable to carrier-to-carrier relationships. It is AT&T's position that the entire dedicated transport link from point A to point Z should be based on a distance sensitive, flat rate charge. The FCC requires dedicated transport to be recovered through a flat rate charge. Qwest's rate structure for EUDIT does not follow the FCC's guidelines, because the rate for the EUDIT is non-distance sensitive. It is an average rate.

AT&T further states that this practice is discriminatory. The SGAT provides that CLECs can use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a mid-span meet arrangement. A mid-span meet to an independent telecommunications carrier is priced on a fixed and per mile basis. If a CLEC wishes to obtain dedicated transport to connect its wire center to a

Qwest wire center, it must use a non-distance sensitive EUDIT. If a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT. CLECs are also carriers, and the same ability to obtain dedicated transport on a distance-sensitive rate from the Qwest wire center to the CLEC wire center should also be available.

The recommended resolution appears to be appropriate based on the testimony and will be adopted by the Board

2A. Adding electronics to EUDIT (Report pp. 77-79; Qwest pre-report EEL brief pp. 13-15; AT&T pre-report EEL brief pp. 43-44; AT&T post-report comments pp. 63-65)

In relationship to the last issue, this area of impasse has to do with the electronics that are used with the transport trunks between the wire centers. AT&T argues that the FCC ordered that the LEC is obligated to provide the electronics to the transport on both ends. Qwest argues that adding electronics to the CLEC wire center constitutes “new construction” and Qwest is not obligated to provide new construction. Rather the CLEC must install its own electronics.

AT&T in its brief argued that Qwest could not provide EUDIT without the electronics necessary to permit the transmission of signals. AT&T said that the FCC definition of transport in the UNE Remand Order, paragraph 356, requires that dedicated transport include the electronics.

Qwest objected to the requirement that it install new electronics or upgrade existing electronics at a CLEC wire center for the purpose of allowing existing fiber facilities to function as transport elements. Qwest cited paragraph 324 of the UNE Remand Order, which provides:

> [W]e do not require incumbent LEC to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.

Qwest construes the installation of new or upgraded electronics as new construction. Qwest also cited the availability of dark fiber as a UNE and noted that footnote 292 of the UNE Remand Order makes clear that the CLEC must install its own electronics on such fiber.

Liberty's report states that Qwest does not have any obligation to provide the electronics, which is considered new construction. Citing the UNE Remand Order, paragraph 324, the ILEC does not have to construct new facilities for CLECs, which the ILEC does not already have in place.

In AT&T's comments to Liberty's report, AT&T reiterates the FCC's UNE Remand Order stating that requirement for electronics. AT&T also states that the FCC noted that "self provisioning dedicated transport requires CLECs to incur significant direct and other costs, including the cost of the fiber, the cost of deploying the fiber in public rights-of-way, trenching, and the cost of purchasing and collocating the necessary transmission equipment." AT&T further argues that Liberty essentially ignores the FCC's conclusion and finds that CLECs are not impaired if they have to provide electronics on dedicated transport. AT&T then states that the Liberty has no power to change the FCC's findings.

The recommended resolution appears to be appropriate based on the testimony and will be adopted by the Board

3. Commingling UNEs and Interconnection Trunks

that AT&T has acquired from Qwest as a UNE. If the DS1 had been acquired from Qwest as a UNE, there would be no question about the right to connect it to transport acquired as a UNE; the resulting combination would constitute an EEL, which CLECs can secure from Qwest. The problem in AT&T's case was that the DS1 loop was not secured as a UNE, but as tariffed service, and was only acquired in that fashion because a loop was not available. Because the DS1 loop was acquired as a tariffed service, Qwest would not allow it to be connected to a transport UNE, because Qwest would construe that connection as violating the commingling restrictions imposed by the FCC.

Qwest responded specifically to the EEL commingling issue by reciting paragraph 28 of the Supplemental Order Clarification, in which the FCC explicitly said that it would not eliminate the commingling prohibition, which it defined there as "combining loops or loop-transport combinations with tariffed special access services."

However, Liberty's recommendation states that it seems reasonably clear that the goal of a CLEC is not at all to avoid access charges, but rather to find a way to secure a service through a facility that would normally be available as a UNE, were adequate facilities available, or were Qwest willing to construct them where they were not. The CLEC will actually be paying access charges that would have been avoided had it secured a UNE. Thus, it does not appear that this situation falls within the zone of interests that the FCC was seeking to protect in the Supplemental Order Clarification. Liberty also states that Qwest's interpretation of the paragraph 28 of the

Supplemental Order Clarification is not supportive of its argument. These provisions talk about prohibiting loops and loop/transport combinations to be commingled with tariffed services. In this limited case, no loop or loop/transport UNE is being commingled with the tariffed service; the tariffed service is itself the access to the DS1 loop. AT&T seeks to connect the tariffed DS1 service with a transport element. Liberty recommended the following language be added to the SGAT:

> Where a CLEC has been denied access to a DS1 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.

AT&T in its comments to Liberty's report states that AT&T generally accepts Liberty's proposal except for one detail. AT&T used the example of DS1 loop to support its arguments, however, there may be times where AT&T may purchase a DS3 or higher bandwidth service as a retail service and may wish to connect to UNE transport. AT&T requested the words "or other high-capacity" be inserted after the word DS1 in the SGAT.

The Board disagrees with AT&T and will deny AT&T's request to change the SGAT to include the new language. The Board notes that AT&T continuously used the DS1 example throughout the workshops and briefs. The SGAT language was recommended by Liberty, and agreed upon by Qwest. AT&T now wants to change its example to include other types of transport, providing Qwest no opportunity for challenge.

The Board will adopt Liberty's resolution of this issue.

3. Waiver of Termination Liability Assessments for EELs (Report pp. 84-87; Qwest pre-report EEL brief pp. 28-30; AT&T pre-report EEL brief pp. 48-49; Qwest post-report comments p. 20; AT&T post-report comments pp. 65-67)

AT&T argued that Qwest failed to provide EELs when required, choosing to wait until extensive litigation about the obligation to provide them ended in a 1999 decision by the U.S. Supreme Court and subsequent federal court decisions. AT&T took the position that Qwest was required to provide UNE combinations, including EELs, as of the time of the First Report and Order on August 8, 1996. Only after litigation about that order ended long thereafter did Qwest begin to provide EELs. Therefore, CLECs were required up until that time to make purchases of special access/private line circuits in order to achieve the functionality of EELs. Those purchases were made under terms that impose charges for early termination and that sometimes require up-front payment of portions of the costs of construction. AT&T argued that CLECs should not now have to pay these termination charges when they seek to transform the private line purchases into EELs that should have been available in the first place.

XO and ELI also addressed this issue, arguing that Qwest be required to waive termination liability where a CLEC has incurred such liability because it could not obtain UNEs. This would create a rebuttable presumption that such a waiver should apply until the Commission has ruled that Qwest has demonstrated that it is providing high capacity UNEs and EELs as required by the Act and Commission-approved interconnection agreements. The presumption would be rebutted by evidence that one of the following two conditions has been met:

- The termination liability is for the recovery of special construction costs on the same terms and conditions that Qwest applies to other customers.
- The CLEC had an effective choice between tariffed services and UNEs at the time it made an election to take tariffed services.

Qwest's brief argued that it has no obligation to waive TLAs when special access circuits are converted to EELs, which, Qwest said, it only became obligated to provide recently. Qwest argued that is would be unfair for CLECs to keep the advantages of the reductions they received from full tariff prices they have paid under long-term arrangements, while avoiding the term requirements that are Qwest's compensating side of the bargain. Qwest also said that the FCC, which is now reviewing the issue of converting special access circuits to EELs, has already decided that TLAs are not an appropriate issue for Section 271 proceedings. However, Qwest states in its brief that in the spirit of cooperation and compromise, it has made a proposal to resolve the issue. Qwest will not apply a TLA if all of the following conditions are met:

- CLEC's private line circuit(s) was ordered or augmented between February 17, 2000 (the effective date of the UNE Remand Order) and May 16, 2001 (the date of this proposal);

- Qwest did not have to build facilities to install the private line circuits at issue to meet CLEC's request;

- CLEC identifies and communicates in writing to Qwest on or before August 1, 2001, each circuit it believes qualifies under this proposal; and

- Each private line circuit so identified qualifies under one of the three local use options contained in Section 9.23.3.7.2 of the SGAT and CLEC identifies which option each circuit qualifies under.

Liberty concluded the record demonstrates that CLECs have purchased special access circuits in cases where Qwest is now making EELs available. More specifically, it is reasonable to conclude that CLECs are paying higher interstate access tariff rates for facilities that could now be acquired as EELs. The only supportable resolution would be to say that Qwest could not impose TLAs where continuation of facility use by the CLEC as a UNE would have allowed for the same degree of facility investment recovery as was implicit in the original agreement giving rise to the TLA. However, Qwest's proposal appears to go beyond that requirement; it would allow TLA waiver even where it might not obtain similar revenues. Therefore, it is generally acceptable. This issue can be considered resolved on terms consistent with the public interest if Qwest agrees to drop the second and fourth conditions of its proposal and to extend the circuit identification date to November 30, 2001. SGAT language to the following effect will accomplish such a resolution:

> Qwest will waive any TLA charge otherwise applicable under the agreement or tariff election by which a CLEC ordered or augmented a special access circuit under interstate tariff between February 17, 2000, and May 16, 2001, provided that CLEC identifies and communicates in writing to Qwest

> on or before November 30, 2001, each circuit it believes to qualify hereunder. Nothing herein shall be construed as expanding the rights otherwise granted by this SGAT or by law to elect to make such conversions.

Qwest should also have the right to demonstrate, in any comments to the commissions concerning this report, why the obligation-to-build provision not accepted here would promote the public interest. This proposed language also does not explicitly incorporate Qwest's brief condition that its proposal be implemented on an individual case basis with each CLEC. The reason is that the structure of the procedure incorporated into the above-recommended language appears to make the process inherently CLEC-specific. It is not clear what, if anything, would be added by an explicit ICB clause.

In its comments to Liberty's report, AT&T states that Liberty's proposed language essentially waives TLAs for circuits ordered as special access circuits between February 17, 2000, the effective date of the UNE Remand Order, and May 16, 2001, provided the CLEC identifies the circuits and notifies Qwest. AT&T takes issue with using the effective date of the UNE Remand Order.

Qwest argues it was not required to provide the EEL until the effective date of the UNE Remand Order. However, Qwest has been obligated to provide combinations of UNEs since the date of the Local Competition Order, or August 8, 1996. Although the subject of appeal, the obligation to provide combinations was never stayed. Although the Eighth Circuit vacated the ILEC's obligation to combine UNEs, the U.S. Supreme Court upheld the rule prohibiting ILECs from separating

UNEs, and many states implemented their own requirement requiring CLECs to combine UNEs. Therefore, the language proposed by the Facilitator should be amended by striking “February 17, 2000” and inserting “August 8, 1996.”

The recommended resolution appears to be appropriate based on the testimony with the date change as proposed by AT&T.

4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs (Report pp. 87-88; Qwest pre-report EEL brief p. 27; AT&T pre-report EEL brief p. 50-52; Qwest post-report comments pp. 20-21)

This issue is no longer at impasse.

5. Counting ISP Traffic Toward Local Use Requirements (Report pp. 88-89; Qwest pre-report EEL brief p. 30; XO/ELI pre-report brief pp. 8-10; Qwest post-report comments p. 21)

The Board will adopt the recommendation from the August 20, 2001, report

Checklist Item 6: Access to Unbundled Local Switching

Issues Remaining in Dispute

1. Access to AIN-Provided Features (Report pp. 92-93; Qwest pre-report switching brief pp. 33-38; AT&T pre-report switching brief pp. 20-27; Qwest post-report comments pp. 21-22)

The Board will adopt the recommendation from the August 20, 2001, report.

2. Exemption from Providing Access to Switching in Large Metropolitan Areas (Report p. 93-94; Qwest pre-report switching brief pp. 38-40; AT&T pre-report switching brief pp. 27-30; Qwest post-report comments p. 22; AT&T post-report comments pp. 67-69)

The issue for the Board's determination is whether AT&T’s post-report comments challenging Liberty’s resolution are relevant to Iowa’s determination of checklist compliance.

In most cases, under checklist item 6 of section 271, Qwest must provide CLECs access to unbundled switching; i.e., switching at UNE rates as opposed to switching at market-based rates. The only exceptions are spelled out in the FCC's *UNE Remand Orde*r. In that order, the FCC determined that in certain circumstances CLECs are not "impaired" without access to unbundled switching. Specifically, the order stated:

> Despite our conclusion that, in general, requesting carriers are impaired without access to unbundled switching, we conclude that it is appropriate to establish a more narrowly tailored rule to reflect significant marketplace developments. As described more fully below, we find that requesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (MSAs), as set forth in Appendix B, where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1. (Paragraph 278)

The only city in the seven participating states for which the unbundled switching exemption applies is Salt Lake City. Furthermore, the FCC "froze" the list of zones "as they existed on January 1, 1999" (*UNE Remand Order*, at 286). Thus it appears, for the foreseeable future, no exemption from providing unbundled switching applies to Iowa.

Nevertheless, AT&T's testimony and brief regarding the unbundled switching exemption was filed in each of the seven states. Liberty's report also addressed the exemption in each of the seven states. AT&T has filed post-report comments in each of the seven states challenging Qwest's EEL product as it applies to the switching exemption.

The Board sees this issue as one relevant only to Utah. As of this date, the Utah Commission has not ruled on the EEL/switching exemption issue. The Board will not decide this, or any unbundled switching exemption, issue at this time because the unbundled switching exemptions are not applicable to Iowa.

3. Basis for Line Counts in Applying the Four-Line Exclusion (Report pp. 95-96; Qwest pre-report switching brief p. 40; AT&T pre-report switching brief p. 30; Qwest post-report comments pp. 22-23)

This issue is no longer at impasse.

4. Providing Switch Interfaces at the GR-303 and TR-008 Level (Report p. 96; Qwest pre-report switching brief p. 40; AT&T pre-report switching brief pp. 30-32; Qwest post-report comments p. 23; AT&T post-report comments p. 69)

This is not a disputed issue, but rather appears to be a comment from AT&T stating that the language in Qwest's brief for section 9.11.1.1.2 in the SGAT is acceptable for AT&T, however, the language is not in the "frozen" SGAT provided by Qwest. AT&T states that the language should be in the final SGAT that will be filed by Qwest.

The Board agrees that it is appropriate for the language to be included in the final SGAT to be filed by Qwest and directs Qwest to include the language.

SUMMARY

Assuming Qwest incorporates each of the recommendations as set forth above, verbatim, the Board is prepared to indicate at this time its conclusion that Qwest has conditionally satisfied each of the checklist requirements addressed in the August 20, 2001, report, subject to the same limitations noted earlier in this statement related to other proceedings and processes.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 21st day of December, 2001.